NO. 22660

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY MORRIS COCKRELL and IVY DELL COCKRELL,	)
Petitioners and Appellants,	)
v.	)
E. J. OBERHAUSER and IVERNA CARTER,	)
Respondents and Appellees.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

AND

SUGGESTION FOR REHEARING IN BANC

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LIST OF AUTHORITIES CITED

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PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE STANLEY N. BARNES, AND SHIRLEY M. HUFSTEDLER, CIRCUIT JUDGES, AND GUS J. SOLOMON*, DISTRICT JUDGE:

Appellee respectfully requests a rehearing for the purpose of reconsideration of the applicability to this case of the principles enunciated in Griffin v. California (1965), 380 U.S. 609, 85 S. Ct. 1229, and Bruton v. United States (1968), 391 U.S. 123, 88 S. Ct. 1620, upon which the reversal as to Leroy Morris Cockrell was based.

Appellee respectfully suggests that a rehearing in banc would be appropriate because the questions involved are of exceptional importance. Rule 35(b), Rules of Appellate Procedure.

QUESTIONS PRESENTED

(1) Is Griffin, which under the Fifth Amendment proscribes comment or instructions to the jury in a trial by

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* Chief Judge, U.S. District Court, Portland Oregon, sitting by designation.

jury on inferences to be drawn concerning a defendant's failure to testify at trial applicable where (a) the defendant testifies; (b) trial was by the court and not by jury; (c) there was no comment; (d) in a pre-Escobedo[1] trial there was testimony that the defendant remained silent in the face of an extra-judicial accusation by a co-conspirator after being given an opportunity to speak; and (e) the defendant testified at the trial that he remained silent on the advice of his attorney?

(2) Is Bruton, which holds that a defendant's Sixth Amendment right of confrontation has been violated in a joint trial by the admission of a confession by a co-defendant made out of his presence and inadmissible hearsay as to him applicable where (a) the subject confession was made in the presence of the defendant; (b) one of the crimes charged and to which the confession related was a conspiracy; and (c) at the time of trial the confession was admissible against the defendant under traditional rules of evidence?

ARGUMENT

I

We respectfully request reconsideration by this Honorable Court of its opinion, which holds that an accusatory confession by co-defendant Phillips in Leroy's presence, together with evidence that the officer asked Leroy what he had to say about "that," and that Leroy remained silent, was

1. Escobedo v. Illinois (1964), 378 U.S. 478; Johnson v. New Jersey (1966), 384 U.S. 719.

incorrectly admitted on the theory that Leroy's silence in the face of an accusatory statement was an implied admission of guilt, and that receipt of that testimony violated Leroy's Fifth Amendment privilege against self-incrimination under Griffin v. California (1965), 380 U.S. 609.

Appellee respectfully submits that mere evidence of silence in the face of an accusation is not within the Griffin rule, and that the holding by the United States District Court in its Order Denying Petition for Writ of Habeas Corpus was correct in stating that "the requirements of [Griffin] are not applicable" to this case.

Griffin is concerned only with comment or instructions to a jury on the inferences it should draw from the fact that a defendant refuses to testify. It specifically states,

> ". . . . What the jury may infer [from evidence of failure to testify], given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. . . .
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> ". . . .
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> ". . . . We . . . hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is

evidence of guilt." (Emphases added.) Griffin v. California (1965), 380 U.S. 609, 614, 615.

California's voluntary extension of the Griffin rule does not require retroactive enforcement by the federal courts. McClain v. Wilson, 370 Fed. 2d 369, 370 (1966, Ninth Circuit).

There is nothing in the Griffin decision which has any detrimental application to the facts of the Cockrell case. The evidence that Leroy remained silent in the face of an accusation was a fact as properly before the trier of fact as it was evident to the jury in Griffin, that Griffin failed to take the stand in the face of the testimony against him. Evidence of the mere omission, therefore, in response to a direct question, where relevant and material, cannot be inadmissible on the basis of the Fifth Amendment. It is evidence of conduct, not testimony. Griffin in no way intimates that it is error, nor could it on its facts, since Griffin's omission to testify in response to the damaging testimony against him was a fact clearly evident to the jury. The jury could infer what it chose.

Griffin in no way proscribes evidence of silence, nor does it in any way inhibit the inferences that may naturally be drawn therefrom. Neither does it hold that the prosecution must not present evidence against a defendant if he refuses to testify. Yet that is the effect of the Cockrell application, which holds that since he refused to speak, both the statement by Phillips incriminating him and evidence of his silence were erroneously admitted.

Silence in the face of an accusation, together with an opportunity to explain or deny, is evidence of conduct from which the inference that it is an implied admission of guilt may reasonably be drawn. It is, however, only an inference, and may be refuted. Leroy did refute it, and testified not only that he was silent only because his attorney had told him to on a prior occasion, but also denied the substantive matter contained in Phillips' accusation. The court, therefore, as the trier of fact, was faced with no more than a conflict in the evidence, a matter of credibility, a question of fact and not of law.

In other words, a defendant cannot claim that his assertion of his privilege not to be compelled to testify under the Fifth Amendment protects him from prosecution, neither can he claim protection from natural inferences to be drawn from his failure to controvert or explain the evidence against him when given an opportunity to do so, whether this failure is in or out of court. "No constitution can prevent the operation of the human mind." Griffin, p. 1237 (dissent by Mr. Justice White).

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II

Appellee further respectfully requests a rehearing for the purpose of reconsidering the applicability of Bruton v. United States (1968), 391 U.S. 123; 88 S.Ct. 1620.

The opinion of this court holds that the admission against Leroy Cockrell of Phillips' confession violated his Sixth Amendment right of confrontation which compels reversal of his conviction. Reference here is to Phillips' second confession which was made in Leroy's presence, since the first was not admitted against him (Rep. Tr. pp. 198, 201-203) and as the opinion states as to Ivy Cockrell the Bruton rule does not apply because the trial was by court and not by jury and "Nothing in Bruton suggests that a judge is incapable of applying the law of limited admissibility which he has himself announced."

The second confession, made in Leroy's presence, was admitted against him (Rep. Tr. pp. 203-207), and is the subject herein.

This confession was, of course, admissible against Phillips. It was relevant, however, not merely for that reason, but as a declaration by a co-conspirator concerning a conversation between herself and Leroy made during the conspiracy in furtherance of the conspiracy to sell marijuana, one of the counts with which they were charged. It was thus admissible against Leroy as a well-established exception to the hearsay rule.

". . . [I]t is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts." Krulewitch v. United States (1949), 336 U.S. 440, at 443-444; 69 S.C. 716. See People v. Gant, 252 Cal. App. 2d 101, 110, 60 Cal. Reptr. 154; People v. Morales, 263 Cal. App. 2d 368, 374-375, 69 Cal. Reptr. 402.

Where a party to a confession or admission, as Leroy was in this case, is himself present in court and can and does, as he did, testify in explanation or contradiction of the prior statement or conduct, no exclusionary rule can reasonably be invoked on the basis of a violation of his Sixth Amendment right of confrontation.

In Bruton, the evidence was admissible against a codefendant, but inadmissible against Bruton. The jury was instructed that "a confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession," (emphasis added) and that it should disregard the therefore inadmissible hearsay evidence. This was in accord with the rule enunciated in Delli Paoli v. United States (1957), 352 U.S. 232, 77 S. Ct. 294, 1 L.Ed. 2d 278,

which Bruton overruled.

The Court in Bruton stated as follows in footnote 3, 391 U.S. 123, at p. 128:

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, (Citations.) There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. (Citations.)"

We have in the testimony here under discussion a confession, which was a declaration made by an unavailable witness (an exception to the hearsay rule), relating a conversation between the declarant and the defendant Leroy during the conspiracy and in furtherance thereof (an exception to the hearsay rule), made in the presence of the defendant Leroy (an exception to the hearsay rule). The testimony was, therefore, admissible against both the declarant and Leroy under traditional rules of evidence.

Pointer v. Texas (1965), 380 U.S. 400, was decided two years after the trial in this case but eight months prior to the decision by the California Supreme Court in the case. No issue under Pointer has ever before been suggested until mere citation to the case in the opinion upon which this rehearing is requested. The State courts have never had an opportunity to rule on the applicability of either Pointer

or Bruton herein and state remedies, therefore, have manifestly not been exhausted.

Even if Pointer has any application to this case, which we in no way concede, there still remain two other recognized exceptions to the hearsay rule relating to the fact that this was a conspiracy trial and Leroy was present at the confrontation.

In reversing as to Leroy, on tenuous technical grounds, the court is releasing a narcotic dealer who was found in possession of enough marijuana to make 30,000 cigarettes. Furthermore, Leroy was convicted of three separate counts, sale of marijuana (Count II), possession of marijuana for sale (Count VI), and conspiracy to sell marijuana (Count VII). The Court has failed to state on which counts the convictions are reversed by the reversal of the denial of the writ. The confession-accusation is clearly not applicable to Count VI.

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CONCLUSION

For all of the foregoing reasons, questions of exceptional importance relating to evidence admissible by the prosecution in its proper function as a representative of the People in a criminal trial, a rehearing is respectfully requested.

Respectfully submitted,

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